IN THE

Supreme Court of the United States

October Term, 1962

No. 687

In the Matter of the Application
of
A. CHENEY GREENE and EVELINA S. GREENE,
for an order declaring unreasonable, illegal and void,
a certain search and seizure, etc.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

A. Cheney Greene and Evelina S. Greene, petitioners, pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit affirming a judgment of the United States District Court for the Western District of New York dismissing their petition for the suppression of evidence and the return of certain papers, books and records obtained by an alleged illegal search and seizure, and in violation of petitioners' rights under the Fourth and Fifth Amendments.

Opinion Below

The opinion of the court below (29)* is not yet reported. It is unofficially reported in CCH Standard Federal

* References without a letter are to appendix to this petition. References to petitioners' appendix in the court below are "1a"

Tax Reporter, U. S. Tax Cases, Advance Sheets at Paragraph 9110.

Jurisdiction

The judgment of the Court of Appeals was entered on December 5, 1961 (35). The jurisdiction of this Court is invoked under 28 U. S. C., Sections 1254 and 2201(c).

Constitutional Provisions, Statutes and Regulations

Amendments IV and V of the Constitution, Sections 7602, 7604(a) and 7604(b) of Title 26 of the U. S. C., and Section 1005(a) Title 5 of the U. S. C., and Section 2255 Title 28 of U. S. C. and Rule 41(e) of the Federal Rules of Criminal Procedure are set forth in the Appendix.

Questions Presented

1. Is a taxpayer, who was under criminal investigation from the beginning, entitled to a hearing in the District Court to resolve the issues of fact raised by his petition to suppress evidence obtained by the "Special" (criminal) agents who knew the taxpayer considered the matter civil and not criminal and who allegedly promoted this deception by using misleading and false letters, not the statutory summons or other legal process to overcome the taxpayer's failure to comply with their initial requests to produce the evidence?

2. Is the same taxpayer also entitled to an order suppressing the oral and documentary evidence obtained from him by the "Special" (criminal) agents whose total course of conduct was calculated to affirmatively allay the taxpayer's normal caution and to deprive him of his constitutional protection against self-incrimination and

right to counsel by creating the false and mistaken belief that the matter was civil, not criminal, where the undisputed facts show:

(a) The investigation was criminal from the beginning.

(b) The taxpayer was not made aware of his position, by any police identification or uniform, arrest, summons or other legal or administrative process.

(c) The only implied caution was contained in the phrases "Special Agent", "Intelligence Division". The criminal significance of these phrases was totally unknown to this particular taxpayer.

(d) The taxpayer had never previously employed an attorney or an accountant and had never been previously contacted by the Internal Revenue Service in connection with his returns filed over a 29 year period.

(e) The taxpayer was not given any express caution or advice on his rights until the investigation was completed.

(f) The taxpayer immediately sought the advice of counsel when first advised of the possibility of criminal proceedings. This was not until after the 7 month criminal investigation had been completed.

Statement

The petitioners are A. Cheney Greene, a farmer and nurseryman, and Evelina S. Greene, his wife. Both were born and raised in a rural community and made their living by their hands (5a, 6a). At the time of the investigation they lived on a small grape farm outside of Westfield, New York (6a).

Mrs. Greene had prepared the family tax returns since 1930 (6a, 7a). She kept whatever records the nursery and farm operations maintained. Neither she nor Mr. Greene had ever had the assistance of accounting services or legal counsel (32a). No return had ever been audited or challenged before this investigation (7a).

About November, 1959, "Special Agent" Vincent J. Carbone (a criminal agent attached to the Criminal Fraud Section) commenced the investigation of the petitioners (52a). The investigation was triggered by an informer's complaint and the petitioners were unknowingly the subjects of an existing criminal investigation from the very beginning (24).* Special Agent Carbone, before contacting his suspects, examined their prior returns for 10 years (8a, 53a) and apparently carefully prepared for the detailed three hour criminal net worth interrogation which followed (9a). Armed with this information, the Special Agent twice drove from Buffalo, New York, to Westfield, a distance of 60 miles, in order to "interview" the taxpayers and to obtain their records from their home (53a).

Using the apparent authority of civil investigators, the criminal agents obtained admission to the taxpayers' home and "interviewed" Mr. Greene for three hours. The items necessary for a criminal prosecution based upon a net worth calculation were carefully covered and signatures on the prior returns for 10 years verified (9a). No indication that criminal charges were being considered was given and no caution or warning on the right to counsel or against self-incrimination was mentioned. No search war-

* The reply affidavit of Agent Carbone opposing petitioners' motion in the District Court suggested that the matter was civil in the beginning (52a). Upon oral argument in the Court of Appeals, counsel for the Government admitted the matter began on an informer's statement being investigated by criminal agents (24).

rant or other legal process of any kind was employed, (8a).

At the same initial "interview" the "Special Agents" asked for the taxpayers' complete records (9a). Mrs. Greene had the records in Florida and the agents were unsuccessful in obtaining the documents at that time (9a). The efforts of the "Special Agents" did not end at this point without further efforts to complete their criminal investigation from the taxpayers' own mouths and records. This was only the beginning of a protracted criminal investigation.

In December, 1959, following the Agent's "interview" Mr. Greene, with the help of his friend, Mr. Carstater, a pharmacist in the Jamestown Hospital, who did part-time accounting work (10a), prepared and filed amended returns for 1957 and 1958.

Meanwhile, the "Special Agent" continued his efforts to obtain the petitioners' records. The language of his requests did everything possible to allay the fears of the petitioners who were at the time the *present* suspects of a criminal investigation and potentially the accused in a criminal net worth tax indictment, for example:

> In Exhibit F, on December 21, 1959, he concludes his letter with respect to a certain form that it may be: "returned in the enclosed self-addressed envelope requiring no postage" (16a).
>
> In Exhibit G, on January 8, 1960, the agent concludes: "Thank you for your cooperation" (17a).
>
> In Exhibit I, on February 1, 1960, the agent concludes: "Self-addressed envelope requiring no postage is enclosed for your convenience in replying" (21a).

On February 1, 1960, with the criminal investigation apparently stalled by the petitioners' failure to deliver

the requested documents, "Special" Agent Carbone wrote the taxpayers, "As you know, we wish your records for the purpose of audit" (11a, 20a).

Finally, on March 1st, four months after the first "interview", the criminal agents, by using misleading and untruthful statements in lieu of legal process or the statutory Internal Revenue Code summons (see appendix) were able to obtain petitioners' records for their use in their existing criminal investigation (11a, 21a-23a). Quite naturally a recommendation for criminal prosecution followed (45a, 46a) and this has lead to the present petition. At no time from November until after the investigation was completed in June were the petitioners cautioned of the *existing criminal* investigation then being conducted against them or their constitutional rights to seek counsel and stand silent (13a).

The depredation of the petitioners' constitutional rights did not end with this carefully designed procurement of the petitioners' records. The "Special" Agent Carbone with the documents of the taxpayers now in hand rapidly proceeded with the other phases of his criminal investigation, interview of customers (39a), statement from the Chief of Police (44a), all gathering in the evidence from the leads he had obtained.

Armed with this information, the "Special" Agent, in June, 1960, notified the petitioners to appear at the District Director's Office in Buffalo for final questioning (29a, 30a). Here the last step in the criminal agent's carefully prepared investigation was to be completed. Armed with all the documents and information necessary to support a criminal net worth charge, the criminal agents were to interrogate the petitioners and record their extemporaneous answers and attempts to explain this vast accumula-

tion of circumstantial evidence (12a). The petitioners, without any charge laid against them, with no knowledge whatsoever that crime was even under investigation and in response to the apparent authority of "Civil Investigators", were going to have their attempts to explain and recall the facts and figures of their financial history recorded. Each admission was to become a vital cog in a subsequent criminal prosecution. Each omission or failure was to burden petitioners' efforts to establish their innocence after the secret charge was finally laid. Innocent of the trap about to be sprung but disquieted by the Agent's now apparently formal request to record their answers, Mr. Greene asked:

> "Just a minute, how serious is this thing? I have been up and aboveboard with you and helped you guys all I could. Now are you going to be up and aboveboard with me and tell me what kind of a mess I am in? Do I need an attorney?" (12a).

The criminal investigator, Agent Carbone, who had now been working on the case seven months, replied:

> "That is not for me to say. You have friends and you can talk to them" (12a).

This is the language given in the petitioners' affidavit. Agent Carbone does not dispute it. Mr. Greene's affidavit also states without contradiction that the criminal agent then insisted that the "Interview" proceed (13a). Following this fair request on the need for counsel and the refusal of the informed criminal agent of the Government to answer, the "interview" in the form of an interrogation of the present suspects and potentially accused continued for 3 hours (13a).

The final phase of the criminal investigation having been completed with this "interview" the criminal agent completed his written report setting forth the grounds for criminal prosecution (25a). The voluminous circumstantial

evidence which began with the criminal agent's "interview" and search in the taxpayers' kitchen, November 18, 1959, was completed and submitted to the Chief of the Criminal Section (29a, 30a).

For the first time on June 2, 1960, with the criminal investigation complete and only the formality of indictment and arrest to follow, the Chief of the Criminal Section, revealed the true nature of Agent Carbone's work over the past 7 months. By letter addressed to the taxpayer, he stated that "Consideration is being given to criminal prosecution" and the taxpayer is invited to "appear with counsel if you so desire" and give such explanation, as they wish, to their unwittingly self-incriminating actions and statements (29a, 30a). For the first time in this letter the word "Criminal" or any suggestion of a charge against the taxpayer is mentioned.

Significantly, faced with the first suggestion of their true position, the petitioners retained counsel and qualified accountants within eight days. The present petition to suppress the evidence followed in an effort to correct this admitted deception practiced by the "Special Agents".

By petition and order to show cause returnable the 28th day of November, 1960, the petitioners-appellants sought an order (1) declaring the evidence to have been illegally obtained; (2) directing its return; (3) suppressing its use; (4) directing a hearing on the issues raised (2a-5a).

Upon the return date of the order to show cause the Government submitted a single affidavit of the Special Agent Carbone (52a-66a). No witnesses were sworn, proof taken or other evidence submitted by the Government in opposition to the petitioners' application which included 6 supporting affidavits with exhibits.

The District Court denied petitioners' request for a hearing and decided the entire application upon the affidavits without opportunity for the petitioners to cross examine the Government's criminal agent with respect to the denials in his reply affidavit and without opportunity to subpoena or submit additional proof in support of their application (67a-71a). The application was denied in all respects.

Pending the argument and decision on appeal, the District Court, without objection by the Government, entered an order staying the presentation of the disputed evidence to the Grand Jury with an appropriate provision protecting the Government's rights with respect to the Statute of Limitations.

On appeal, the Circuit Court affirmed, holding there was no error in denying the petitioners a hearing on their motion and no issue of fact was presented by the affidavits which would require a hearing (31). With respect to the additional admission by the Government's counsel on appeal that the matter began as a criminal investigation on an informer's statement, the Court of Appeals held the possible motives of the investigation did not matter (31) because petitioners "were charged with knowledge of the possible criminal consequences," (32) apparently in spite of the undisputed allegations and facts in their petition to the contrary (10a, 34a).

Jurisdiction of the District Court

Federal jurisdiction for the motion to suppress and a hearing is based upon Rule 41e of the Federal Rules of Criminal Procedure (23) which requires "the motion shall be made before trial" and that "the judge shall

receive evidence on any issue of fact necessary to the decision of the motion." See *Grant v. U. S.*, 282 F. 2d 165 (2nd Cir. 1960), petition for Writ of Certiorari now pending. Jurisdiction to suppress also rests on the Fourth and Fifth Amendments and general supervisory power of the Federal Courts. *Perlman v. U. S.* (1918) 247 U. S. 7; *Bardeau v. McDowell*, 256 U. S. 465 (1921).

REASONS FOR GRANTING THE WRIT

1. A conflict exists between the decisions of the Second and Fourth Circuits.

In the present case, coming from the Second Circuit, petitioners claimed they were wrongfully denied a hearing by the District Court. The Court of Appeals on December 5, 1961, affirmed the denial of a hearing.

The same question was presented to the Fourth Circuit in *Elizabeth G. Austin v. U. S.* (First reported December 27, 1961, CCH, Standard Federal Tax Reporter, @ 9122). The Fourth Circuit reversed the District Court and held a hearing should be granted. Neither taxpayer, Greene or Austin, was aware of or cited the other proceedings.

The Second Circuit decision of December 5, 1961, was made without knowledge of contrary result in the *Austin* case decided November 21, 1961, but not reported unofficially until December 27, 1961, *supra*.

In the Second Circuit the court held the District Court on affidavits alone properly held there was "no substantial issue of fact which required a hearing" (31) and that "the government agents had practiced no deception; that they had not misled the petitioners into believing that the investigation would be limited to civil penalties" (31).

This holding and finding by District Court without a hearing was in the face of Mr. Greene's allegation:

> "* * * Our friend, Jim Carstarter, in Jamestown had told me that when he had told Carbone that he did not have our records, Carbone had told him he had to produce the work sheets and that Carbone could get a demand warrant compelling him to give Carbone the work sheets. From this and all other conversations and actions of Mr. Carbone, we believed that the government had an absolute right to our papers and that no question of crime was even being thought of" (11a).
>
> * * *
>
> "* * * I still do not clearly understand what the Intelligence Division is or why it can obtain my own records and ask me questions in order to convict me of a crime and send me to jail when everything Mr. Carbone said and did from the beginning was because 'We wish to audit your records for each of the years 1955 through 1958' as shown in his letter and in everything else he said and did" (13a, 14a).

Mrs. Greene attested to the same deception:

> "* * * At no time, until we first talked to our lawyer, did I know that the papers the Internal Revenue Service was requesting or the questions which were being asked were in any way a part of a criminal investigation" (33a).
>
> "* * * From everything he did and said, I was led to believe that the Government was asking for information purely to audit our returns and determine the correct tax as stated in Mr. Carbone's letter and my note to him, which I have referred to before" (35a).

These allegations are categorically denied by the single affidavit of the "Special" agent:

> "That at no time did the deponent or his associate, Frank E. Becker, or to the best of the deponent's knowledge, information and belief, or any other agent of the Internal Revenue Service, ever mislead A. Cheney Greene or Evelina S. Greene into believing that

> no criminal prosecution might result from his investigation, * * *" (57a).

This presented a square issue of fact entitling petitioners to a hearing before the District Court. Rule 41e of the Federal Rules of Criminal Procedure so provides:

> "The judge shall receive evidence on any issue of fact necessary to the decision of the motion."

Contrary to the Second Circuit and upon facts not nearly so strong, the Fourth Circuit held Rule 41e and the equity power of the court entitled petitioners to a hearing.

Chief Judge Sobeloff framed the rule of the Fourth Circuit in *Austin, supra*, so:

> "In summary, we are of the opinion that an individual claiming that evidence was taken from him in violation of either his Fourth or Fifth Amendment rights may bring a proceeding, whether it is styled a 'Rule 41(e) motion,' or an 'independent equity proceeding,' prior to indictment to have his claim adjudicated. Unless his allegations clearly show that, even if true, he would be entitled to no relief, he should be given a hearing, and the court should make findings of facts and conclusions of law."

In *Austin* the taxpayers were fully experienced in tax matters and prepared returns for others as a livelihood and had themselves been audited before (See Page 30, Brief & Record, Austin). By petition the Austins claimed the agents misled them into believing the investigation was directed against their own returns, not their action in preparing false returns for others. This is indeed a sophisticated claim compared to the simple assertion of the uninformed, unaware Greens, who had no prior tax experience and simply "did not know that a crime or anything criminal was even the subject of discussion" (9a).

The Greenes' petition did not hang only on their say so. The Vice President of Welch's Grape Juice, in a supporting affidavit, stated he discussed the matter with Mr. Greene and saw him regularly and that Mr. Greene "was totally unaware of the nature of the investigation." A former Mayor also supplied a supporting affidavit stating:

> "* * * the facts as set forth in this affidavit I find it impossible to believe he had knowledge that he was being investigated between the fall of 1959 and the summer of 1960 for possible criminal violation of the tax laws" (42a, 43a).

As pointed out before, the agent told Mr. Greene's friend that he could get a demand warrant compelling the production of records (11a). Mr. Greene concluded, "the Government had an absolute right to our papers" (11a). This is at least equal to the Austins' assertion that the agents spoke "in a threatening tone" and said "they would get them (the records) anyhow." Identical facts cannot be expected in both cases and need not be. Under the rule in the *Austin* case, the Greenes were entitled to a hearing. It is for this court to say whether the rule of *Austin* should apply or whether the Second Circuit's rule governs and the taxpayers, despite allegations and facts to the contrary "were charged with knowledge of the possible criminal consequences (and) will not now be heard to complain." This petition should be granted to determine which rule, the Fourth Circuit's or the Second Circuit's, should apply.

2. Proper enforcement of the Internal Revenue Laws with due regard for the taxpayers' constitutional rights, is a question of peculiar gravity and general importance. It should be decided.

In 1959 over 2,600,000 returns were audited, 3,464,000 are projected for audit in 1962. There are over 90,000,000

returns processed each year (1961 C. C. H., Standard Federal Tax Reporter, Vol. 7, p. 73,944). This entire voluntary process, where cooperation is essential to success can be jeopardized by disregarding taxpayers' rights and by unfairness in the relatively few, 1,640, tax fraud investigations resulting in 702 defendants for the same year, 1959 (C. C. H., *supra*, p. 73,949).

The Commissioner of the Internal Revenue Service himself appearing in April, 1961, before a Subcommittee of the House Committee on Appropriations, stated:

> "I wish to express this as strongly as I possibly can, because I feel this deeply; one of the healthiest things our tax system could have would be a reasonable and fair audit of the taxpayers * * *"
>
> * * * * *
>
> "For we must ultimately rely on voluntary compliance if we are to preserve our tax system" (1961 C. C. H., Standard Federal Tax Reporter, Vol 7, page 73,944,5).

The point here is very simple. Unless the Government is absolutely fair in its investigation and enforcement of the tax laws the entire system of self-assessment of taxes upon which the very existence of government depends is placed in jeopardy. It is for this reason any overreaching by criminal agents investigating 1640 cases resulting in only 702 indictments must be carefully avoided lest the entire audit system of over 2,600,000 returns become an adversary proceeding.

If the millions of "audits" must be charged with "criminal possibilities" as the Second Circuit ruled (32) then the entire process, civil and criminal, becomes a "catch me if you can" proposition. A taxpayer, charged with knowledge that any "audit" requested even in the most unctious

tones or as a matter of "your convenience" (21a) or "your cooperation" (17a) is in fact a matter of self-incrimination, has no choice except to assert the Fourth and Fifth Amendments. Not only would this be a disaster to the orderly handling of the two to three million admittedly civil audits but it is complete fiction. The fact that any one of 2,600,000 "audits" may be one of 702 indictments is just not so. As any tax practitioner knows, even "possible criminal proceedings" are not even the subject of conversation in these millions of audits. The fact 702 indictments may result from two to three million audits is no basis for a legal presumption charging the taxpayer with a knowledge he in fact does not possess and stripping him of his constitutional protection in an *existing* and *disguised* criminal investigation.

The current practice of making criminal investigations appear civil is a matter of the first importance for the decisions of this court. It has received repeated attention of those engaged in tax matters:

> *Kostelanetz, "Bill of Rights Not Re[illegible]ed for Taxpayers,"* 34 *Taxes* 16 (1956);
>
> *Doyle, "Searches and Seizures and [illegible]ety to Warn in Fraud Investigations,"* N. [illegible]. *14th Ann. Inst. of Fed. Tax.* p. 1317 (1956);
>
> *Avakian, "Searches and Seizures,"* N. Y. U. *17th Ann. Inst. of Fed. Tax.* p. 531 (1959);
>
> *Lipton, "The Taxpayer Under Fraud Investigation,"* 47 A. B. A. Journal 265 (March, 1961);
>
> *"Will You be Ready for a Tax Audit?", 37 Medical Economics 85* (February, 1960).

Taxpayers, like Greene and Austin, seeking the protection from the courts threaten a flood of the instant proceedings. (See cases previously already cited in the pend-

ing petition of *Luther F. Grant and Sirrka V. Grant v. U. S.* and those in the brief below in *Austin, supra*, where extension of time to file petition has been granted the Government by Hon. Potter Stewart on December 21, 1961.)

The solution is not difficult. The Internal Revenue Service, like the F. B. I., when investigating a *present* suspect, should advise the citizen of his rights. A criminal agent should be called "criminal", not "special".

The taxpayer is entitled to at least that much caution within the spirit of *Culombe v. Conn.*, 367 U. S. 568 (1961). This imposes no new burden on law enforcement. It is as old as a Sheriff's badge and the police uniform. The duty to fairly identify is preliminary to the right to ask and enforce. The power of the Government to reach inside the home of every citizen, search out records of every business must be exercised with the maximum, not minimum, "fair play" and regard for constitutional rights. The question here sought to be reviewed reaches not only the two or three million parties who will be asked to "cooperate" in civil audits. It reaches every taxpaying citizen and warrants review by this court.

3. The decisions of the District and Circuit Courts are contrary to Federal Statutes, Rules of Procedure and the decisions of this court.

By Section 7602 of the Internal Revenue Code of 1939, the Internal Revenue Service was given the power to summon the records of the taxpayers. Appropriate protection for the summons' use and enforcement was provided in subsequent Section 7603 and Section 7604. This was the method with attendant safeguards provided by Congress.

Quite naturally, a written formal notice, required to describe "the records or other data * * * with reasonable certainty", would serve as a caution and some warning to the taxpayer. The natural result from service of such a paper would be for the taxpayer to seek the advice and aid of counsel, his constitutional right.

The Second Circuit held the agents were free to turn their backs on the procedure provided by Congress as "cumbersome" (32). There is nothing in the statute justifying the conclusion it may be disregarded as "cumbersome".* In fact, as stated upon argument by counsel for the Government, to obtain a summons the agent merely puts the printed form in the typewriter. A valid § 7602 summons requires nothing more and compliance can be directed in *ten* days § 7605, T. 28 U. S. C.

In lieu of this simple, direct statutory procedure the agents for almost four months, November to March, employed misleading if not false letters seeking "cooperation" (17a) "for audit" (20a) and at the taxpayers "convenience" (21a) in a matter which was in fact criminal. The reason is obvious. It was part of an overall plan to deceive and mislead the taxpayers and quiet the normal apprehension of even a normal civil audit. From the outset to the final interview (12a) the agents stuck to their continuing plan to separate the taxpayers unknowingly from their constitutional rights to counsel (12a) and to stand silent.

The decision of the Second Circuit that the agents may ignore the statutory procedure as "cumbersome" should

* If granted a hearing, petitioners can show the agents, as a matter of routine, did in fact use the § 7602 summons on Mr. Greene's brokers and banks. The Government must admit this fact which is just another reason why it seeks to avoid a hearing on the issue of the alleged plan "to obscure the warning inherent in their request". *U. S. v. Solomon*, 265 F. 2d 408 (2nd Cir. 1948).

be reviewed by this court. The requirement that other criminal investigators employ warrant or legal process is now no longer questioned, *Johnson v. U. S.*, 333 U. S. 10 (1948); *McNabb v. U. S.*, 318 U. S. 332 (1942).

The decisions are in further direct conflict with Rule 41(e) of the Federal Rules for Criminal Procedure. This rule, very likely based on the experience of this court in *coram nobis* and other writs seeking to correct invasion of constitutional rights after trial, provides that the motion to suppress "shall be made before trial" and the Judge "shall receive evidence on any issue of fact necessary to the decision". This was the holding in the *Austin* case discussed, *supra*. The decision of the District Court and the Second Circuit in *Greene* is contrary to these express provisions of the Rule. The denial of a hearing at the threshold of the claimed invasion of constitutional rights can only lead to unnecessary trials and special appeals or writs to correct the error after the fact. The problem is already acute. The 1960 Annual Report of the Director of the Administrative Office of the United States Courts noted at Page 115:

> "* * * While motions to vacate sentence and petitions to test the validity of deportation orders remained about the same numerically as last year, applications brought both by State and Federal prisoners in confinement as a result of a criminal conviction reached new highs. Federal prisoners filed 573 *habeas corpus* petitions, an increase of 28 percent over the 449 filed last year, and State prisoners filed 871 petitions, an increase of 6 percent over the 822 filed in 1959. In the last nine years, *habeas corpus* applications by persons in custody pursuant to the judgment of a State court have increased 80 percent."

The rule espoused by the Second Circuit; that the matter may be disposed of without a hearing by the District Court

can find no support in Rule 41(e), the facts of the case or the Decisions of this Court granting hearings in *coram nobis* proceedings as a matter of right to correct errors of the most fundamental character. *U. S. v. Morgan*, 346 U. S. 502, 512, 513 (1953). Upon motions after sentence, seeking to correct violation of constitutional rights, a hearing is required by statute unless the record "conclusively shows that the prisoner is entitled to no relief". § 2255, T. 28, U. S. C. Otherwise, the prisoner is "absolutely entitled to a hearing." *U. S. v. Paglia*, 190 F. 2d 445 (2nd Cir. 1951). A timely motion made pursuant to rule in advance of trial should stand on no weaker ground than motions seeking to upset the finality of conviction, judgment and sentence.

The disregard of the statutory summons and provisions for a hearing on the motion warrant review by this court.

Conclusion

Enforcement of the Internal Revenue Laws with due regard for the taxpayer's constitutional rights is a matter of particular importance and this petition for Writ of Certiorari should be granted to determine the questions raised by the conflicting decisions of the Second and Fourth Circuits.

Respectfully submitted,

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Buffalo 2, New York.

APPENDIX

Constitution of the United States

AMENDMENT IV

Searches and Seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property

• • • nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

26 U. S. C. Section 7602.:

§ 7602. Examination of books and witnesses

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

26 U. S. C. Section 7604:

§ 7604. Enforcement of summons.

(a) Jurisdiction of district court.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) Enforcement.—Whenever any person summoned under section 6420(e)(2), 6421(f)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required,

the Secretary or his delegate may apply to the judge or the district court or to a U. S. Commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

Title 5, United States Code § 1005(a):

> "(a) Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel * * * Every party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding."

28 U. S. C., § 2255.

> "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, * * * may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> "A motion for such relief may be made at any time.
>
> "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt

hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto * * *"

Federal Rules of Criminal Procedure, Rule 41(e):

(e) Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

Appendix

Affidavit of New Facts and Letters Submitted Upon the Appellate Argument

(Same Title.)

State of New York,)
County of Erie.) ss.:

RICHARD E. MOOT, being first duly sworn, deposes and says:

That he is an attorney and partner in the firm of Dudley, Stow & Sawyer, counsel for the petitioners-appellants in the above entitled proceeding; and that:

1. Immediately following the oral argument before the Court of the petitioners' appeal which was heard at 11:30, Wednesday morning, November 8th, 1961, counsel for the respondent, United States Government, admitted and stated to deponent, counsel for the petitioners, that the investigation of the Special Agent Carbone was criminal in nature from its inception.

2. This admission and conversation with counsel for the U. S. Government, to the best of deponent's ability to recall on the afternoon of November 8, 1961, is as follows:

> Mr. Harold O'Connor, attorney for the Government, stated, "Do you know how this investigation first got started?"
>
> Mr. Moot: "No, I do not. How did it happen?"
>
> Mr. O'Connor: "Well, some man, who worked for the Greenes, had some difficulty with his wages and called up the Internal Revenue Service and reported that these people were millionaries. He said, 'I have seen their income tax returns and they are not reporting their income.' The same man complained a second time to the same effect. And, you know what that is. That is criminal."
>
> Mr. Moot: "Well, there are two troubles with what you say. First, that is not what Agent Carbone said

in his affidavit. Under oath he said, 'There was nothing to indicate there had been a violation of the laws.'" (See the Record, 52a).

Mr. O'Connor: "Well, I didn't say there was a violation of the laws. I said it was criminal, but not evidence of crime. I prepared the affidavit of Mr. Carbone very carefully and I believe it is correct."

Mr. Moot: "Well, I don't think so, and I think that's the very reason why we should have a hearing in this case."

3. In addition to the quoted language above, which is set forth to the best of deponent's recollection, your deponent also discussed with Mr. O'Connor generally the difficulties in this type of case which arise because the Internal Revenue Service persists in the right to question, not merely potential accused, but present suspects of crime, without the caution and the warning adopted and required by the F. B. I.

4. This affidavit is submitted to show the position of the parties and because your deponent understood from the Government's remarks and the record that the Government had previously maintained that the investigation was merely a routine civil affair and that the petitioners were not at the very inception the present subjects of a criminal investigation and an informer's statement. None of these facts were known to your deponent prior to the conclusion of the argument before the Court on November 8, 1961.

RICHARD E. MOOT.

Sworn to before me this
9th day of November, 1961.
George M. Gibson,
Notary Public, State of New York.
Qualified in Erie County.
My Commission expires Mar. 30, 1962.

* * *

Appendix

November 9, 1961

Hon. John T. Curtin,
United States Attorney,
U. S. Courthouse,
Buffalo 3, New York.

A. C. Greene

Dear Sir:

Following the argument of the appeal in the above matter, your assistant, Mr. Donald O'Connor, informed me for the first time that the tax investigation of our clients, Mr. and Mrs. Greene, commenced as a criminal matter upon the repeated complaint of an informer.

I am enclosing two copies of my affidavit setting forth my conversation with Mr. O'Connor.

I do not believe the facts reported by Mr. O'Connor at the conclusion of the argument on appeal are consistent with the affidavit of the Special Agent in the record on appeal, Page 52a, where the agent stated:

> "At the time of receiving this assignment it appeared to the deponent that this was merely an investigation of a farmer's income tax return where wealth was accumulated over the years without violation of the Revenue Laws."

It is of the utmost importance to our clients that the complete and true facts be brought to the attention of the Court promptly. In view of the omission or misstatement in the agent's affidavit we request that the Department of Justice promptly bring this matter and the enclosed affidavit to the attention of the Circuit Court of Appeals.

Very truly yours,

RICHARD E. MOOT,
for DUDLEY, STOWE & SAWYER.

35w
Enc.

• • •

Appendix

November 13, 1961

Clerk of the United States Court
of Appeals for the Second Circuit,
Federal Building,
Foley Square,
New York 7, New York.

In the Matter of the Application
of A. Cheney Greene & Evelina S.
Greene, Docket No. 27026,
Cal. No. 55

Dear Sir:

I am enclosing the original and three copies of affidavit stating new facts in connection with the above appeal which was argued November 8th. I am also enclosing 4 copies of my letter of November 9th addressed to the U. S. Attorney requesting him to bring these facts to the attention of the Court.

I have been advised today by Mr. Donald O'Connor, of the U. S. Attorney's Office, that they do not wish to bring the matter to the attention of the Court and that they do not consider it their job to do so or that they should do so. With the exception of the internal quotation at the top of the second page of my affidavit. Mr. O'Connor states the affidavit is substantially accurate.

Will you please see that this matter receives the attention of the Court in an appropriate manner. The appellants would welcome an opportunity for reargument prior to the decision of the Court if an exception can be made.

Appendix

It is the appellants' position that the fact this investigation began with an informer's complaint and that the petitioners were the present subjects of a criminal investigation is not consistent with the affidavit filed with the District Court nor the position of counsel for the Government upon oral argument or its brief where it stated at Page 3:

> "Despite assertions to the contrary in appellants' brief [*e.g.* Appellants' Brief, Page 5] there is no suggestion in any of the affidavits presented that this was other than a routine visit incorporated in the overall scope of Agent Carbone's investigative duties."

Very truly yours,

RICHARD E. MOOT,
for DUDLEY, STOWE & SAWYER.

35w
Enc.

Appendix

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 55—September Term, 1961

(Argued November 8, 1961 Decided December 5, 1961.)

Docket No. 27026

A. CHENEY GREENE and EVELINA S. GREENE,
Petitioners-Appellants,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Before: Lumbard, *Chief Judge*,
Medina and Waterman, *Circuit Judges*.

Appeal from denial by the United States District Court for the Western District of New York, John O. Henderson, *J.*, of a pre-indictment motion under Federal Rule of Criminal Procedure 41(e) for the suppression of tax records allegedly secured by deceit by agents of the Internal Revenue Service and other relief.

Affirmed.

Richard E. Moot, Buffalo, New York (Dudley, Stowe & Sawyer, Buffalo, New York, on the brief), for petitioners-appellants.

C. Donald O'Connor, Assistant United States Attorney, Western District of New York, Buffalo, New York (Neil R. Farmelo, United States Attorney, Western District of New York, on the brief), for respondent-appellee.

LUMBARD, *Chief Judge:*

A. Cheney Greene and his wife appeal from an order of the United States District Court for the Western District of New York which denied their application under Rule 41(e) of the Federal Rules of Criminal Procedure for the suppression as evidence in any future proceeding and return of certain records which they had turned over to a special agent of the Internal Revenue Service in Buffalo about March 1, 1960. The Greenes contended that the special agent of the Internal Revenue Service had secured the records by guile and deceit by saying that he wanted them for an "audit" of the Greenes' income tax returns for the years 1955 through 1958, concealing the fact that he was conducting a criminal investigation. This alleged deceit was said to violate the Fourth Amendment as interpreted in *Gouled v. United States*, 255 U. S. 298 (1921). The Greenes also urged that their constitutional rights had been violated by failure to warn them that a criminal investigation was under way and that they had a right not to answer any questions.

Judge Henderson passed upon the affidavits submitted in support of the petition and the affidavit of Special Agent

Vincent J. Carbone submitted in reply. Holding that the affidavits raised no substantial issue of fact which required a hearing, Judge Henderson denied the application without a hearing. He found that the government agents had practiced no deception; that they had not misled the petitioners into believing that the investigation would be limited to civil penalties; that the records were turned over voluntarily and understandingly by the petitioners, citing *Turner v. United States*, 222 F. 2d 926 (4 Cir.), cert. den., 350 U. S. 831 (1955), and our decision in *United States v. Sclafani*, 265 F. 2d 408 (2 Cir.), cert. den., 360 U. S. 918 (1959). We agree that there was no issue which required a hearing and that, on the affidavits before it, the district court reached the only possible conclusion, that there had been no overreaching or invasion of petitioners' rights and that they had turned over their records freely. Accordingly, we affirm the order of the district court.

From the visit of Agents Carbone and Becker to Mr. Greene's home at Westfield, New York, on November 18, 1959, and from numerous letters which passed between the Greenes and representatives of the Internal Revenue Service, it was perfectly apparent that the agents were investigating the accuracy of the Greenes' tax returns. As we said in *United States v. Sclafani, supra*, at 414-15, the commencement of such an investigation, entirely routine to all appearances, carries with it a warning that if the evidence uncovered warrants it criminal proceedings may be begun. We cannot accept the appellants' attempts to distinguish among the possible motives which impel the Revenue Service to initiate investigations; in any case, the investigating agents are able to determine whether criminal prosecution is warranted only after they have ascertained

the relevant facts and examined the available records. The records here in question were needed for precisely this purpose. Explicit warnings need not be given concerning possibilities that may never come to pass.

Here the agents involved in the investigation did nothing to obscure the implicit warning that any information or records they might obtain might be used in a criminal prosecution. Stating that they were conducting an "audit" surely did not exclude the possibility that they might find discrepancies to be willful so as to require consideration of criminal proceedings. Nor should the agents be criticized for requesting records rather than using the cumbersome statutory summons procedure under § 7602 of the Internal Revenue Code of 1954, as suggested by the petitioners. The Greenes did not claim that their action in sending the records to the Revenue Service's Buffalo office were in any way involuntary. Since at the time that they took this voluntary action they were charged with knowledge of the possible criminal consequences, they will not now be heard to complain that it should be undone because they were not sufficiently advised of the possible consequences. See *Grant v. United States*, 291 F. 2d 277 (2 Cir. 1961). There was no error in denying the Greenes a hearing on their motion, since they had no ground for complaint even if all the facts alleged in their affidavits were true.

Certain other arguments are made by appellants concerning matters that we do not consider relevant to the motion to suppress and the alleged unreasonable search and seizure. We think it improper to consider these matters at this time; they may be litigated prior to or at the trial of any charges which may be brought.

Appendix

We think the staying of criminal proceedings pending this appeal, without any time limitation on such stay, raises a serious question regarding the proper administration of criminal justice. The district court in its show cause order of November 23, 1960, stayed all criminal proceedings by the government pending the determination of the motion to suppress and the service of notice of entry of an order thereon. The record also discloses a new stay issued on July 17, 1961, pending the final determination of the appeal, which provided that the stay would not prevent the United States Attorney from filing a complaint "if necessary, in the month of March, 1962, in order to toll the Statute of Limitations." At any rate the result was that by the time this appeal was heard the government had already been stayed almost one year.

If any stay was appropriate, and we do not say that it was not, then it was incumbent on the court to see that the entire matter, including the prosecution of the appeal, was disposed of without undue delay. Although the government's answering affidavit was filed December 13, 1960, it was not until March 30, 1961 that the district court's order, as amended, was entered. Thereafter the Greenes filed their notice of appeal, and the record in the case was not filed in this court until June 16, 1961. While these actions of appellants were not untimely under the applicable rules,[1] the district judge, in his discretion, might well have conditioned his stay upon condition that the appeal be prosecuted speedily. Instead, in granting the further stay on July 17, he did no more than to provide that the government's right to bring an indictment before the running of the statute of limitations in March 1962 should not be

prejudiced. The command and spirit of Rule 50 of the Federal Rules of Criminal Procedure, which gives precedence to criminal proceedings as far as is practicable, surely require a consideration of the delays involved when the district court is asked to stay the government from proceeding.

If an expedited appeal had been requested in this court, it would in all probability have been granted. We have frequently given special treatment to cases having to do with criminal proceedings, see, *e.g.*, *Pugach v. Dollinger*, 277 F. 2d 739 (2 Cir. 1960), aff'd 365 U. S. 458 (1961), and we are always ready to do so upon application. Moreover for good cause we have convened panels of the court during the summer, see *United States v. National Marine Engineers' Beneficial Ass'n*, 294 F. 2d 385 (2 Cir. 1961) (argued August 17, 1961; decided August 22, 1961); *Taylor v. Board of Education*, 294 F. 2d 36 (2 Cir. 1961) (argued July 18, 1961; decided August 2, 1961). Here the appeal has taken its course as if it were a civil dispute between private parties. We take this occasion to remind the bar and the district courts that every effort should be made to speed the dispensation of criminal justice. *Cf. Cobbledick v. United States*, 309 U. S. 323 (1940).

The order of the district court is affirmed; the stay is forthwith vacated; the mandate will issue immediately.

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[1] Presumably proceedings under Rule 41(e) are governed by the Federal Rules of Civil Procedure when, as here, no prosecution has yet been begun. See *Russo v. United States*, 241 F. 2d 285 (2 Cir.), cert. denied, 355 U. S. 816 (1957). Since the government is a party to the action, appellants had 60 days to file their appeal under Civil Rule 73(a); the record on appeal was required to be filed in this court within an additional 40 days under Rule 73(g).

Appendix

Judgment

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifth day of December one thousand nine hundred and sixty-one.

Present: Hon. J. Edward Lumbard,
Chief Judge,
Hon. Harold R. Medina,
Hon. Sterry R. Waterman,
Circuit Judges.

In the Matter of the Application
of
A. CHENEY GREENE and EVELINA S. GREENE,
Appellants.

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is affirmed.

Further ordered that the stay heretofore granted by the court below be and it hereby is vacated forthwith.

Further ordered that the mandate shall issue forthwith.

A. DANIEL FUSARO,
Clerk.